IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 16.02.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.Nos.170 and 171 of 2000

Ponmani Jessi :Appellant/Complainant in Crl.A.No.170/2000

M.Selvaraj .. Appellant/Complainant in Crl.A.No.171/2000

vs.

Valliammai .. Respondent/Accused in both appeals

Prayer: These appeals have been preferred under section 378 (4) of Cr.PC against the Judgment dated 13.10.1999, in C.C.Nos.8888/1998 and 8889/1998 on the file of the Court of XIII Metropolitan Magistrate, Egmore, Chennai,respectively.

For Appellant (both appeals) : Mr.C.M.Gunasekaran

For Respondents (Both appeals) : Mr.B.Ravindran

COMMON JUDGMENT

These appeals have been preferred against the judgment in C.C.Nos.8888/1998 and 8889/1998 respectively. The complainant in the private complaint is the appellant herein.

Crl.A.No.170 of 2000:

2. The short facts of the private complaint preferred by the complainant Ponmani Jesai in C.C.No.8888 of 1998 relevant for the purpose of deciding this appeal, are as follows:-

The accused Valliammai gave a cheque for Rs.3,50,000/- dated 17.9.1998 to the complainant in lieu of the amount due under hand loan. When the said cheque was presented in the Canara Bank,Mandaiveli Branch, the said cheque was returned with an endorsement that there is no sufficient funds in the drawer's account. The complainant issued a notice on 23.9.1998. The said notice was received by the accused on 5.10.1998. But the accused

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neither sent any reply nor chosen to discharge any amount towards discharge of the debt. Hence the private complaint.

3. The complaint was taken on file by the learned XIII Metropolitan Magistrate on the basis of the sworn statement of the complainant. When the accused appeared on summon before learned Judicial Magistrate, copies under Section 207 Cr.P.C. were furnished to the accused when the offence levelled against him was explained to him,he pleaded not guilty.

4. On the side of the complainant, the complainant was examined as P.W.1. P.W.2 is the bank official wherein the accused is having his accounts and P.W.3 is the bank official wherein the complainant is having his account. Exs P1 to P7 were marked. Neither oral nor documentary evidence was let in on the side of the accused,

4a) P.W.1 in his evidence would depose that the accused had borrowed on four or five times to the tune of Rs.3,50,000/- and in discharge of the said loan, she gave a cheque for Rs.3,50,000/- dated 17.9.1998 and Ex A1 is the said cheque and when the cheque was presented in Canara Bank, Mandaiveli Branch for encashment, the same was returned with Ex P2 memo stating that there is no sufficient funds in the drawer's account. Ex P3 is the letter received from his bank(P.W.1) . A notice was issued on 23.9.1998. Ex P4 is the copy of the notice. The accused had received the notice on 5.10.1998. Ex P5 is the acknowledgment. After filing of the complaint, the accused had sent a reply Ex P6.

4b) P.W.2 the Manager of the Tamil Nadu Industrial Co-operative Bank, Chepauk Branch would depose that Ex P1 cheque dated 18.9.1998 was presented in his bank for encashment but the said cheque was returned with an endorsement that there is no sufficient funds in the drawer's accounts. Ex P2 is the memo . Ex P7 is the statement of account in respect of the accused account will go to show that there was only a balance of Rs.252.65 on 18.9.1998.

4c) P.W.3 is the Manager of the Canara Bank ,Mandaiveli Branch who would depose that the cheque dated 17.9.1998 was presented to his bank for encashment but the same was returned by his bank on 20.9.1998 since there was no sufficient funds in the drawer's account. The debit advice is Ex P3.

5. When the incriminating circumstances were put to the accused he denied his complicity with the crime. After going through the available documents, the learned XIII Metropolitian Magistrate, Egmore, Chennai has come to the conclusion that the complainant has not proved the guilt of the accused under Section 138 of NI Act and accordingly he dismissed the complaint. Aggrieved by the findings of the learned trial Judge, the complainant has preferred this appeal.

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Crl.A.No.171 of 2000:

6. The complainant in C.C.No.8889 of 1998 on the file of the XIII Metropolitan Magistrate, Egmore, Chennai is the appellant herein.

7. The short facts of the complaint of the complainant relevant for the purpose of deciding this appeal are as follows:

The accused Valliammai had borrowed a sum of Rs.1,25,000/- from the complainant and in discharge of the said amount, the accused had drawn a cheque of Rs.25,000/- dated 25.6.1998 and another cheque of Rs.1,00,000/- dated 17.9.1998 . When the said cheques were presented in the Bank of India, Chepauk Branch on 17.9.1998, they were returned with an endorsement that there is no sufficient amount in the account of the drawer. The complainant has given notice to the accused on 5.10.1998. In spite of the receipt of the notice, the accused neither sent any reply nor chosen to discharge the debt. Hence, the appeal under Section 138 of Negotiable Instruments Act.

8. The said complaint was taken on file by the learned XIII Metropolitan Magistrate, Egmore, Chennai and on appearance of the accused copies under Section 207 Cr.P.C. to the accused were furnished and when the offence was explained to the accused, the accused pleaded not guilty.

9. Before the trial Court,P.Ws 1 and 2 were examined and Exs P1 to P10 were marked. Neither oral nor documentary evidence was let in on the side of the accused.

10. The complainant as P.W.1 would depose that he is working as a Revenue Administrative Officer in Ezhilagam and that the accused is also working in the same department and that the accused had borrowed a sum of Rs.1,25,000/- and in discharge of the said debt, the accused had drawn a cheque for Rs.25,000/- dated 25.9.1998 and another cheque for Rs.1,00,000/- dated 17.9.1998 and when those two cheques were presented in the Bank on 17.9.1998, they were returned with an endorsement that there was no sufficient funds in the account of the drawer. Ex P3 and Ex P4 are the returned memo. Ex P5 is the letter issued by the Bank. Ex P6 is the notice issued by the complainant dated 23.9.1998 to the accused. Ex P7 is the acknowledgment .Ex P8 is the reply.

10a) P.W.2 is the Manager of the Tamil Nadu Industrial Co-operative Bank, Chepauk Branch, Chennai who would depose that the accused is their customer and she is having an account in the bank and Exs P1 and P2 cheques dated 18.9.1998 were presented in their bank for encashment but on the date , there was only a sum of Rs.252.65 is the bank balance in the account of the accused and that

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both the cheques were returned under Exs P3 and P4 with an endorsement that there was no sufficient fund in the account of the accused. Ex P9 is the statement of account.

11. When the incriminating circumstances were put to the accused he denied his complicity with the crime. She neither examined any witness on her side nor produced any document. After going through the available documents, the learned XIII Metropolitian Magistrate, Egmore, Chennai has come to the conclusion that the complainant has not proved the guilt of the accused under Section 138 of NI Act and accordingly he dismissed the complaint. Aggrieved by the findings of the learned trial Judge, the complainant has preferred this appeal.

12. Now the point for determination in these appeals is whether the Judgment in C.C.No.8888 of 1998 and C.C.No.8889 of 1998 respectively is liable to be set aside for the reasons stated in the memorandum of appeals?

13. I heard Mr.C.M.Gunasekaran, learned counsel appearing for the appellant in both appeals and Mr.B.Ravindran, learned counsel appearing for the respondent in both appeals and considered their rival submissions.

14.The point:-
The learned counsel appearing for the appellant/complainant in both appeals would contend that under Section 138 of the Negotiable Instruments Act and also under Section 139 of the Negotiable Instruments Act, the presumption is that only after the receipt of the amount mentioned, the respective cheque Ex P1 in C.C.No.8888 of 1998 and Exs P1 and P2 in C.C.No.8889 of 1998 , the accused had issued those cheques and since the accused has admitted her signature in all the above three cheques, passing of consideration is to be presumed under Section 118 of the Negotiable Instruments Act and that only after the passing of consideration under the above said three cheques, the cheques were drawn by the accused. In support of his contention, the learned counsel appearing for the appellant, relied on a decision reported in Goa Plast(P) Ltd.,-vs-Chico Ursula D'Souza(2004 Supreme Court Cases(cri) 499). The facts of the above said dictum of the Honourable Supreme Court is that the accused had issued ten post dated cheques of Rs.40,000/- each in favour of the appellant Company for payment towards the liability of the amount misappropriated from the funds of the appellant. When those cheques were presented in the Bank, they were dishonoured by the Bank on the ground that the respondent had issued instructions to stop payment. The appellant had sent a legal notice to the accused regarding the dishonour of the cheques and demanding payment of Rs.40,000/- within 15 days. As the respondent did not comply with the aforesaid notice, the complainant has filed the complaint

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against the respondent for an offence punishable under Section 138 of the Negotiable Instruments Act. According to the appellant, the respondent/accused was working as a Managing Director of the appellant Company. The service of the respondent were discontinued from the month of July 1992. The appellant examined its General Manager on their behalf to prove the complaint. The respondent did not examine any witness. The learned Judicial Magistrate after going through the available evidence, has acquitted the respondent holding that the petitioner has failed to prove the liability and also the respondent had to rebut the presumption under Section 139 of the Negotiable Instruments Act. Hence the appeal was preferred by the appellant before the High Court of Judicature at Bombay. Where also the appellant did not succeed, hence he preferred the present appeal before the Apex Court wherein it has been observed by the Honourable Supreme Court as follows:

> "Reliance was also placed on paragraph 17 of the Judgment of this Court in the case of M.M.T.C.Ltd.,v.Medchl Chemicals and Pharma(P) Ltd., which reads as under (SCC p.240,para 17)
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> 17. There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability."
>
> We are unable to agree with the reasonings adopted by the Courts below. The Judgments of the High Court and the learned Judicial Magistrate are set aside. We hold that Section 138 of the Act will be attracted in the facts of the case and a case for punishment under the provisions is made out.
>
> In the instant case, the cheque issued by the respondent had been stopped for payment on his instructions and the cheque was returned to the appellant unpaid. In view of our discussion in the foregoing paragraphs and on the consideration of the facts and circumstances of the case and the law on the subject, we hold that the respondent shall be deemed to have committed an offence, When the matter was taken up for further hearing on 17.11.2003, the learned counsel for the respondent submitted that this Court may consider the case of the

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respondent and the reason for his inability to pay the amount and may consider imposing lesser sentence by taking a lenient view. We are unable to countenance the said submission for the various reasons stated supra. We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the Act is liable to be punished."

15.The admitted fact of the above case is that ten post dated cheques of Rs.40,000/- each was drawn by the accused in favour of the complainant towards the liability of the amount misappropriated from the funds of the appellant Company. The accused was also employed as a Managing Director of the said Company and on presentation of the said cheques,they were dishonoured, on the advise of the accused for stop payment. So it is clear from the above facts that only to discharge a definite amount which was misappropriated by the accused in that case post dated cheques of Rs.40,000/- each was drawn by the accused in favour of the appellant Company. But in the case on hand, there is absolutely no evidence on record to show what was the actual amount due to the complainant on the date of drawal of cheques viz.,Rs.3,50,000/- dated 17.9.1998 and cheque for Rs.25,000/- dated 25.6.1998 and cheque for Rs.1,00,000/- dated 17.9.1998.

16. Section 138 of the Negotiable instrument Act runs as follows:-

"Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

PROVIDED that nothing contained in this section shall apply unless:-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

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(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation:-For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability.

So it is clear from the above said provision of law that only after the cheque is drawn to discharge in whole or in part or any debt or other liability by the accused when presented before the Bank was returned on the ground of insufficient fund standing in the credit of the account of the accused or for some other reason. The explanation to the above said provision of law clearly tells that to attract an offence under Section 138 of Negotiable Instruments Act there shall be a legally enforceable debt or other liability shall be subsisting on the date of drawal of the cheque. So it is the bounden duty of the complainant to show that only for the subsisting debt or liability, the cheques were drawn by the accused. It is pertinent to note that at this juncture, the evidence of P.W.1 in both the cases. In C.C.No.8889 of 1998 P.W.1 in her cross examination would categorically admit that she is not in a position to say on what date, she advanced loan to the accused and further in crystal clear terms, she would admit that there is no document produced to show that the accused owe Rs.3,50,000/- to her (P.W.1). But she would say that the accused had executed a promissory note but after giving the cheque, the accused got back the promissory note. It is rather surprise to note that even before encashment of the cheque what made the complainant to return the promissory note which is for Rs3,50,000/-. In C.C.No.8888 of 1998,P.W.1 would also admit that he does not remember on which date, he had lent a sum of Rs.25,000/- to the accused. He would say that on very many occasions, he had lent to the accused a sum of Rs,.25,000/- and a sum of Rs,.30,000/-. P.W.1 in both the cases would admit that they are not income tax assessees. P.W.1 in C.C.No.8889 of 1998 has also produced Ex A10, the letter said to have been written by the accused. A perusal of Ex P10 letter said to have been executed by the accused will go to show that it is bereft of any facts and no amount has been mentioned in Ex P10. The accused has stated due to her poverty she could not return the loan amount immediately and she has not mentioned anything about the debt amount in Ex P10. Under such circumstances, it cannot be said that Exs P2 and P3 in

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C.C.No.8889 of 1998 cheques were given in discharge of a subsisting debt of Rs.1,25,000/- on the date of execution of the said cheques Exs P2 and P3. Likewise, it cannot also be presumed that Ex P1 cheque in C.C.No.8888 of 1998 for a sum of Rs.3,25,000/- was drawn by the accused to discharge a subsisting debt of Rs.3,25,000/-. Under such circumstances, the facts of the above dictum of the Apex Court relied on by the learned counsel appearing for the complainant will not be applicable to the present facts of the case since the complainant has failed to prove what was the subsisting debt on the date of drawal of the cheques in both the cases.

17. Under such circumstances, I find no reason to interfere with the well considered judgment of the trial Court, which does not suffer from any illegality or infirmity. Point is answered accordingly.

18. In fine, Crl.A.Nos.170 of 2000 and 171 of 2000 are dismissed confirming the Judgment in C.C.Nos 8888 of 1998 and 8889 of 1998 on the file of XIIII Metropolitan Magistrate, Egmore,Chennai.

sg

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

1. The XIII Metropolitan Magistrate,
Egmore, Chennai.8.

2. -do- Thro' The Chief Metropolitan Magistrate,
Egmore Chennai 8.

+ 2 ccs to Mr. R. Kumaresan, Advocate SR No. 9848 & 9849

PV(CO)
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